APPENDICES

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 19,016

Jesse Freeman, et al.,

Appellants,

v.

The Gould Special School District of Lincoln County, Arkansas, et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas.

[January 15, 1969.]

Before BLACKMUN, GIBSON and LAY, Circuit Judges.

GIBSON, Circuit Judge.

Plaintiffs, six Negro school teachers, with the support of the Arkansas Teachers Association, Inc., seek to compel the defendant Gould Special School District to renew their annual teaching contracts and in addition request damages and attorneys' fees against all the defendants.[1]

In May 1967, the individual plaintiffs received notice from the defendant Gould Special School District that their teaching contracts would not be renewed for the

1 In addition to the School District, the plaintiffs joined T. Raymond Sage, the superintendent of the District, and Horace Itty Dalton, the Negro principal of the Field School, as defendants.

1967-1968 school term for teaching in the district's all-Negro Field School. The notification was in accordance with requirements of Ark. Stat. Ann., § 80-1304(b), whereby teachers' annual contracts are automatically renewed unless notification in writing is made within a prescribed time to the contrary.

The Board's decision not to renew the teaching contracts was based upon a recommendation of defendant Horace Itty Dalton, the Negro principal of the Field School. Dalton was in charge of employment and re-employment at the Field School. His recommendation that the teaching contracts not be renewed was based generally upon his contention that the teaching plaintiffs were incompetent, failed to co-operate with his administration, did not adhere to the chain of command in processing complaints, and some varied personal objections. His views were stated in an informal memorandum set forth on a typewritten sheet to Superintendent Sage and the Board.[2]

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2 The memorandum in pertinent part reads as follows:

"Dear Members and Superintendent:

"Mr. Matlock and myself have worked this program out together all year, and we have come to the conclusion that these people do not meet the requirements of a good school system. I have recommended these people for no contract.

"Mrs. Inez Nichols: 'bullheaded, goes to Pine Bluff without permission, old trends of teaching, don't adhere change of command'

"Mrs. Jesse Freeman: 'incompetent, old fashion teaching methods, keep children afraid of her, disregard modern trends of teaching, insubordination'

* * *

"Mrs. Earlene Woods: 'lazy, out of class everytime I visit elementary department, incompetent and neglect night activities'

"Mrs. Walker: 'after each payday she stays at home, no co-operation, insubordination, don't believe in change of command'

"Mrs. Essie Calloway: 'lazy, incompetent and non-co-operative'

"Mrs. T. N. Wilhite: 'non-co-operative, don't attend night activities, every year skin sickness, in the wrong field-Home Economics major.'"

(The letter also recommended that the contracts of 15 other teachers be renewed.)

Mrs. Nichols and Mrs. Freeman had taught 24 years and 35 years respectively in the Gould District; Mrs. Woods 2 years; Mrs. Walker 4 months; and Mrs. Calloway and Mrs. Wilhite 4 years. There is no procedure or machinery set up under Arkansas law for school boards to conduct a hearing on complaints or on the hiring or rehiring of teachers. The Board at the request of the dismissed teachers did, however, hold a hearing on Monday, June 5, 1967, and another hearing in July 1967, giving the dismissed teachers the opportunity to appear and state their side of the dispute with Dalton. The Board, however, refused to rescind its position.

The complaint filed June 8, 1967, alleged that the Board's refusal to rehire the teachers was "solely because of their race or color and the punitive motivation of defendant Dalton." An allegation was also made that "plaintiffs were discharged because of the impending necessity for defendant district to fully desegregate its faculty by assigning Negro teachers to white schools and white teachers to Negro schools."

The District Court, the Honorable Oren Harris, Chief Judge of the Western District of Arkansas, held that there was no evidence that the teachers were terminated because of their race or color or because of any civil rights issue. He viewed the evidence as presenting no federal question but as an internal dispute between the teachers and their principal, which dispute should remain in the jurisdiction of the School District and the state courts and not brought into federal court. The complaint was dismissed at the close of plaintiffs' case. The District Court specifically found: (1) that the employment of the individual plaintiffs was terminated by defendants for reasons wholly unrelated to any improper racial consideration; (2) that

the defendant School Board acted within the discretion vested in it by law in electing not to employ the individual plaintiffs for the 1967-1968 school year; and (3) concluded as a matter of law "the proof fails to establish that defendants have deprived plaintiffs of any rights, privileges or immunities secured by the Constitution and laws of the United States." While the findings might be more detailed, we believe Judge Harris' findings comply with Rule 52(a), Fed. R. Civ. P. As articulated by Judge Mehaffy in *Manning* v. *Jones*, 349 F.2d 992, 996 (8 Cir. 1965):

> "* * * [A] district court's findings of fact must be liberally construed and found to be in consonance with the judgment if the judgment has support in the record evidence. * * * This is so even if the findings are not as specific or detailed as might be desired."

Plaintiffs assert jurisdiction in the United States District Court under 28 U.S.C. § 1343(3) and (4)[3] and denominate their suit as an action in equity authorized by 42 U.S.C. § 1981 and § 1983.[4] Plaintiffs assert their rights,

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3 Section 1343 in pertinent part reads as follows:

"1343. Civil rights and elective franchise.

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

4 Sections 1981 and 1983 (enacted in 1870 and 1871 respectively) read as follows:

"§1981. Equal rights under the law.

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full

privileges and immunities sought to be secured in this action are guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

We agree with the District Court that the evidence fails to sustain a cause of action under § 1343(3) as there has been no "deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution" or laws; or under sub-section (4) authorizing relief "for the protection of civil rights, including the right to vote"; or under § 1981, the old civil rights section placing all persons on a par with "white citizens"; or under § 1983, another old civil rights section, referring to deprivation of rights, privileges or immunities under color of any statute, ordinance, regulations, custom or usage.

The plaintiffs' complaint cast as a civil rights action fails to show any deprivation of rights or privileges (immunity is not claimed) under color of any State law, statute, ordinance, regulation or custom. No racial discrimination is shown at all.[5] On appeal the plaintiffs have

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and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

"§ 1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[5] All of the teaching plaintiffs testified to the effect that they did not attribute their dismissal to their race or color nor did they have any complaints or evidence concerning the assignment of teachers on the basis of their race or color. All of them denied the charges of incompetency and insubordination. They made counter-charges alleging that Dalton was incompetent, that his motive for singling out the plaintiffs

dropped their initial request for enjoining the defendant School District from employing or assigning teachers on the basis of their race or color and are not pressing their charge that the teaching plaintiffs did not have their contracts renewed because of their race or color. There was no evidence introduced on the first issue, and the finding of the trial court on the latter issue is clearly supported by the evidence. Plaintiffs now contend that the Board acted arbitrarily, capriciously, and unreasonably in its attempt to resolve the conflict between the six teachers and Principal Dalton.

The Board did indicate to the plaintiffs that it would rehire them if they could resolve their differences with Dalton and secure his recommendation for their rehire. The plaintiffs view the Board's position in sustaining Dalton's recommendation for not renewing their contracts and placing upon them the burden of securing Dalton's approval as arbitrary and capricious and a denial of federal due process under the Fourteenth Amendment. Stripped of the racial issue this case presents no federal question.

Teachers in the Arkansas schools are not covered by any type of civil service or tenure law. By Ark. Stat. Ann. § 80-1304(b), they shall be employed by written contract annually. Their status is set forth in *Shelton* v. *Tucker*, 364 U.S. 479, 482, 486 (1960):

> "Teachers there are hired on a year-to-year basis. They are not covered by a civil service system, and they have no job security beyond the end of each school year. The closest approach to tenure is a statu-

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was punitive in nature and resulted from Dalton's lack of administrative ability and competency. They also complained of some personal actions of Dalton. Two of the teachers testified that Dalton made improper advances or proposals to them, which Dalton denied in his deposition and testimony.

tory provision for the automatic renewal of a teacher's contract if he is not notified within ten days after the end of a school year that the contract has not been renewed.

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"* * * [T]he teacher serves at the absolute will of those to whom the disclosure [lists of organizations belonged to within the last five years] must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain."

The Arkansas Supreme Court also specifically observed in *Johnson v. Wert*, 279 S.W.2d 274, 276 (Ark. 1955): "Ordinarily the board has the absolute right to decline to employ or re-employ any applicant for any reason whatever or for no reason at all." This holding is in line with the general law on the employment or re-employment of school teachers.

"* * * [T]eachers are normally subject to selection at the hands of school boards, since among the general powers usually reposed in such boards is included the power to enter into contracts with teachers and to fix their compensation and terms of employment. The discretion of a school board in this respect is very broad, and when such discretion is exercised in good faith and is not contrary to law, the courts will not interfere to aid one whom the board does not choose to employ. The refusal of the board to employ one as a teacher is in no sense an infringement of any constitutional right of that person. The board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all." 47 Am. Jur., Schools § 114 (1943).

While the school boards in Arkansas have the right to decide whom they are going to employ or re-employ, the basis for failing to re-employ must not be on imper-

missible constitutional grounds. *Smith* v. *Board of Education of Morrilton School District No. 32*, 365 F.2d 770 (8 Cir. 1966) (racial discrimination); *Johnson* v. *Branch*, 364 F.2d 177 (4 Cir. 1966), cert. denied 385 U. S. 1003 (racial discrimination); *Shelton* v. *Tucker, supra*, (a disclosure statute violative of the right of associational freedom, closely allied to freedom of speech).

In Arkansas the board's right not to rehire a teacher in the school district appears to be absolute, except that the decision must not rest on grounds that are violative of constitutional or legal rights. The plaintiffs in the District Court, after presenting all of their evidence, argued that as a matter of federal due process they had a right to have their contracts renewed and to receive damages for the failure to renew. They predicated their claim on *Slochower* v. *Board of Higher Education of New York City*, 350 U.S. 551 (1956) and *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957). In *Slochower* the Court in a 5-to-4 decision held unconstitutional a New York City charter provision that provided for automatic dismissal from public employment of one asserting a Fifth Amendment privilege against self-incrimination before any court or public hearing or inquiry. The Court viewed the charter section as violative of the Due Process Clause of the Fourteenth Amendment for the asserted reason that the mere claim of the privilege does not provide a reasonable basis for the termination of employment. 555 of 350 U.S. Under the New York education law, teachers have tenure and can only be discharged for cause after notice, hearing, and appeal. We do not think *Slochower* is applicable as it applied to a tenure situation and an unconstitutional city charter provision.

In *Schware*, the Court in a unanimous decision, with Justice Whittaker abstaining, held a person otherwise

qualified could not be denied the opportunity to take the New Mexico state bar examination on a discriminatory basis of qualification. The Court held at 238-239:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."

and further held at 239: "[A]ny qualification must have a rational connection with the applicant's fitness or capacity to practice law." We do not deem *Schware* as applicable as that case dealt with the general right to practice a profession and did not deal with the narrower question of a right to specific employment.

Almost all of the cases cited in support of plaintiffs' position are concerned with either racial discrimination or an invasion of a constitutionally protected right or privilege by way of a statute or regulation. We agree that the teachers are protected under the Equal Protection Clause from discrimination on account of race or religion or in their assertion of constitutionally protected rights, but no case cited by plaintiffs has gone so far as to say that all actions of any governmental board or agency in employment cases must accord the individual due process under the Fourteenth Amendment so as to provide tenure and a right to retain the position, except for cause. And "for cause" presupposes a right to hearing, notice, and appeal. Many government employees are under civil service and some under tenure. Absent these security provisions a public employee has no right to continued public employment, except insofar as he may not be dismissed or failed to be rehired for impermissible constitutional reasons, such as race, religion, or the assertion of rights guaranteed by law or the Constitution.

Without detailing all of the cases cited, a review of the principal cases relied on is illuminating. In *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952), the Court struck down a so-called loyalty oath holding the "* * * constitutional protection does extend to the public servant whose exclusion *pursuant to a statute* is patently arbitrary or discriminatory." (Emphasis supplied). *Greene* v. *McElroy*, 360 U.S. 474 (1959) dealt with security clearance procedures not authorized by the President or by the Congress; *Schneiderman* v. *United States*, 320 U.S. 118 (1943), a denaturalization proceeding; *Spriggs* v. *Altheimer, Arkansas School District No. 22*, 385 F.2d 254 (8 Cir. 1967), civil rights case concerned with a discriminatory practice in charging tuition; *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278 (1961), Florida statutory loyalty oath; *Franklin* v. *County School Board of Giles County*, 360 F.2d 325 (4 Cir. 1966), discriminatory racial discharge; *Torcaso* v. *Watkins, Clerk*, 367 U.S. 488 (1961), Maryland religious oath violative of First Amendment; *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), Washington statutory loyalty oath.

Plaintiffs rely on *Sefferstone* v. *Tucker*, 357 S.W.2d 3 (Ark. 1962) for their assertion that the Board must meet due process requirements in all of its actions. That case held a school board had not abused its discretion in transferring students from a white [illegible]mentary school and converting that school into a Negro school. This again is a case dealing with racial discrimination and the related problems of desegregation. The Court there, after recognizing the broad discretion vested in the school board, said at 4: "* * * the matter addresses itself to the question as to whether or not the action taken in this case was arbitrary, unreasonable, capricious, wrongful, discriminatory or oppressive." On the basis of this holding, plaintiffs then project that the Board must accord due process,

both substantive and procedural, in all of its operative procedures. If this were so, we would have little need of tenure or merit laws as there could only be, as argued by the plaintiffs, a discharge for cause, with the school board carrying the burden of showing that the discharge was for a permissible reason. We do not believe this to be the law, as there are many public employees who are separated from their employment by a purely arbitrary decision, upon a change of administration or even a change of factional control where the appointments are not protected by civil service or some type of tenure, statutory or contractual.

Plaintiffs also assert they were denied procedural due process in that they were afforded no opportunity to confront and cross-examine Principal Dalton. They cite *Willner v. Committee on Character*, 373 U.S. 96 (1963), which held that a person who had passed a state bar examination had a right to a hearing when his character was put in issue by the adverse report of a bar committee. In discussing the matter the Court stated at 103: "* * * [T]hat procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood." This case again relates to the right of a person otherwise qualified to be licensed in a profession and does not present the same type of situation as the case at bar, which is a right to specific employment.

When a particular statutory procedure is set up for the dismissal of a teacher it must be followed, but absent statutory procedures the Board may adopt its own method. 47 Am. Jur., Schools § 125 (1943). Although not legally required to do so,[6] the Board did accord the teachers a

[6] Under Arkansas law the teachers are not entitled to a hearing as a matter of right. The Attorney General of Arkansas in an opinion dated May 10, 1967 construed the Arkansas law as follows:

"Ark.Stat.Ann., §80-1304 provides for the renewal of teacher's contracts in writing by the directors of the school district. No reason

hearing to air their grievances,—one hearing before this suit was filed and the other one shortly after. Plaintiffs also took Dalton's deposition. This, of course, would not be dispositive of their right of confrontation at the first Board hearing if it were incumbent upon the Board to produce Dalton. Actually, the plaintiffs never requested an opportunity to confront and cross-examine Principal Dalton at a Board hearing. However, we do not think the Board was obligated under these circumstances to produce Dalton at a hearing. Principal Dalton's function in the hierarchy of the school administration was to make recommendations for the employment and re-employment of the teachers. He was serving as an arm of the Board in this respect and, of course, was available for conferences with the Board. From the evidence, it appears the Board acted in good faith, and members of the Board also made their own investigation of the controversy.

The cases cited by plaintiffs deal with procedural due process in criminal proceedings and in proceedings concerned with technically qualified applicants for licensure in a profession where character is also a vital issue. These cases are not germane to the precise issue here of whether the Due Process Clause of the Fourteenth Amendment requires an administrative hearing on the refusal to re-employ a teacher, with subsequent judicial review on a claim of arbitrariness. See, *Studemeyer* v. *Macy*, 321 F.2d 386 (D.C. Cir. 1963), cert. denied 375 U.S. 934. Absent statutory or contractual requirements, persons discharged for inefficiency, incompetency, or insubordination have no

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need be given for the termination of a teacher's contract as this is left to the discretion of the board.

"No statutory authority is found for the granting of a hearing on the matter and consequently a hearing, if granted by the board, may be conducted in whatever manner the board determines most desirable. The teacher may be represented by an attorney at the hearing if the board so desires, but no authority is found for such representation."

constitutional right to a hearing with rights of cross-examination and confrontation of witnesses.

We do not think it within the province of the federal court to pass upon and decide the merits of all of the internal operative decisions of a school district. However, even if we were to pass upon the merits of this issue, we do not think that we could say that the Board was capricious or arbitrary in its attempt to resolve this internal dispute between the teachers and the principal of the school. There must be some degree of harmonious cooperation in school administration to insure an efficient use of public funds and a reasonably satisfactory school program. School boards are representatives of the people, and should have wide latitude and discretion in the operation of the school district, including employment and rehiring practices. Local autonomy must be maintained to allow continued democratic control of education as a primary state function, subject only to clearly enunciated legal and constitutional restrictions.

We, therefore, conclude with the District Judge that there is no civil rights issue presented in this case and that the disagreement between the plaintiff teachers and the principal is an internal matter to be handled by the School Board. Further, there is no federal due process issue presented.

Judgment affirmed.

LAY, Circuit Judge, dissenting:

Six school teachers[1] seek damages under the Civil Rights Act against officials of the Gould School District

[1] Mrs. Nichols had taught 24 years in the elementary department in Field School with a B.S. degree in elementary education; Mrs. Freeman had taught 36 years in the elementary department in Field School with a B.S. degree in elementary education; Mrs. Woods had taught two years

for alleged deprivation of constitutional rights. Their claims arise out of the school board's nonrenewal of their teaching contracts for the 1967-68 school term. The plaintiffs claim that the school officials have arbitrarily excluded them in that there exists no evidentiary support for their rejection because of alleged professional incompetency. The sole issue is whether, under these circumstances, the district court was correct in holding that the plaintiffs have failed to state a claim cognizable under the Civil Rights Act, Title 42 U.S.C. § 1983. The majority affirms the ruling below. I respectfully dissent.

The record demonstrates that the board has adopted the charges of overall incompetence brought by the principal, Horace Itty Dalton, in his official notification of release given to the teachers in May, 1967.[2] Plaintiffs allege that Dalton's purge was based upon personal considerations completely unrelated to their professional com-

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in the elementary department and holds a B.S. degree in elementary education; Mrs. Walker had taught only since February, 1967, and has a B.S. degree in home economics; Mrs. Calloway had taught four years and has a B.S. degree in home economics; and Mrs. Wilhite had taught four years in the high school and has a B.S. degree in home economics.

2 Mr. Sage, the Superintendent of Schools, testified in his deposition:

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"Q. Is the reason or the basis for the termination given by Mr. Dalton that she was incompetent, is that the reason you failed to recommend that she be rehired?
"A. That's right. On Mr. Dalton's recommendation.
"Q. But it was based on her incompetence?
"A. That's right."

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"Q. Did you investigate the charges that he [Dalton] made to determine whether or not there was any substance to them? Did you personally investigate each case?
"A. No. There was no way for me to investigate. If he [Dalton] says the teacher is incompetent, why we put him in there to run that school and hold him responsible for it and if we do, why then we think he should have the right to have recommendations on the teachers.
"Q. Did the board investigate the substance?
"A. No."

petency.[3] The evidence is unequivocal that Dalton's charges of the teachers' incompetency are based upon conclusory, contradictory and incredible statements.[4] Plaintiffs' evidence clearly establishes that these charges of incompetency have no basis in fact.

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3 Each of the teachers charged denied that she had ever done anything wrong and specifically rebutted the truthfulness of any of Dalton's specific charges. Mr. Sage testified that he did not have any reason to believe any of the teachers charged were not truthful in their testimony. He had never received any complaints from persons about the performance of the teachers charged. Each of the teachers had a college degree and generally had teaching experience. See, n. 1, *supra*.

Plaintiff teachers allege that Dalton's dislike for them arises from various situations unrelated to their teaching positions, each of which involved one or more of them: one teacher had testified against him on a criminal charge arising out of a situation where Dalton was arrested when he brandished a gun; the alleged association of two of them with the Student Non-Violent Coordinating Committee in Gould; the assertion by Dalton that the NAACP "bunch" was opposed to him as a principal; rebuffs by two of the teachers of alleged improper advances ("propositioning") made by Dalton; the failure of one teacher to conduct adult classes which were separately funded and distinct from her regular school duties; a spat between two teachers over a car pool arrangement which resulted in Dalton placing a "question mark" behind one of their names; the accusation that one of the teachers was being uncooperative with Dalton by refusing to accept bus duty whereas she was teaching under a special program and had been excused from bus duty by the superintendent; and the accusations of "insubordination" for going over Dalton's head whereas the superintendent encouraged the teachers to bring their problems directly to him.

4 For example, Mr. Dalton, the principal, was questioned concerning the competency of the various teachers:

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"Q. Mr. Dalton, . . . What are the standards that you use for determining whether or not a person is competent?
"A. I don't know what her [Mrs. Dalton's]* standards are.
"Q. All right, then, let's go back to yours. What are your standards?
"A. Same as hers, I guess."

* Mrs. Dalton was the head teacher at the Field Elementary School.

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"Q. Does she [Mrs. Nichols] do a good job in the classroom?
"A. She's a pretty good teacher.
"Q. So she is competent as a teacher?
"A. No, no. I'm not saying that."

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"Q. So you're saying that she is not competent, but that she is a good teacher. How do you explain that, Mr. Dalton?

The majority opinion assumes that the protective cloak of the due process clause as enunciated in *Slochower* v. *Board of Higher Educ.*, 350 U.S. 551 (1956), does not apply to a public school teacher who is without tenure under Arkansas law. I disagree. Constitutional rights of public school teachers are not conditioned upon state tenure laws. The entire discussion of "tenure" is irrelevant to the facts here. *Slochower* does not turn upon recognition of tenure laws but upon the denial of the " 'protection of the individual against arbitrary action' " which violates due process of law. *Id.* at 559. The existence of the New York tenure laws in *Slochower* was incidental to the decision. To reason otherwise is to disregard the teachings of *Shelton* v. *Tucker*, 364 U.S. 479 (1960).[5] The Supreme Court there recognized that a

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"A. I tell you what. The best way that could be answered is let my wife answer that question.
"Q. All right, sir. You can't explain it?
"A. No, I can't explain it."

Mr. Dalton was questioned:

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"Q. Is she [Mrs. Wilhite, one of the teachers not rehired] nosy? Is she nosy?
"A. Sure not nosy, but she's worse than nosy.
"Q. Worse than nosy. How is she worse than nosy? A. No.
"Q. You don't know? A. No."

Again the testimony of Mr. Dalton:

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"Q. Have you been in the classroom long enough to observe that?
"A. I don't need to be in there.
"Q. How do you know they didn't do it?
"A. I get reports. I don't have time to sit in a classroom.
"Q. Are those reports written?
"A. No, they wasn't written.
"Q. We have no way of looking at those reports, do we?
"A. You can only take my word for it."

5 Compare *Romar* v. *Keyes*, 162 F.2d 136 (2 Cir. 1947), where a "probationary teacher" in New York, without tenure, was found to have stated a claim for relief under the Civil Rights Act arising out of her dismissal for absenteeism due to federal jury service.

renewal of a teacher's contract, notwithstanding lack of tenure under Arkansas law, cannot be refused on arbitrary or capricious grounds. Involved in *Shelton* was the denial of a constitutional privilege, namely, freedom of association. However, the significance of the *Shelton* holding is that this denial constituted such arbitrary and unreasonable grounds for refusal to renew a teacher's contract that it was deemed violative of the due process clause of the Fourteenth Amendment.

The majority narrowly interpret *Shelton* and its progenitors to say that the only time an individual can claim protection of due process from arbitrary governmental exclusion is when there has been a denial of an independent and separate constitutional right, such as freedom of association, or racial discrimination. None of these cases is so restricted. Overlooked are the principles of *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957) and *Konigsberg* v. *State Bar*, 353 U.S. 252 (1957).

In *Schware, supra*, a prospective lawyer had been barred from becoming a licensed member of a state bar and the Supreme Court in granting him relief observed:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . Even in applying permissible standards, *officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards . . .*" (My emphasis)

353 U.S. at 238-39.[6] And see *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927):

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6 In *Konigsberg* v. *State Bar*, 353 U.S. 252, 262 (1957), the Supreme Court said:

"Konigsberg claims that he established his good moral character by overwhelming evidence and carried the burden of proving that he

"Deportation without a fair hearing or on charges unsupported by *any* evidence is a denial of due process . . ." (My emphasis.)

The majority stresses that aside from racial discrimination, arbitrary exclusion depends upon a regulation or statute. I submit the Fourteenth Amendment covers more than legislative action of the state. It "governs *any* action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.'" (My emphasis.) *Mooney* v. *Holohan*, 294 U.S. 103, 113 (1935). This principle is so entrenched in constitutional law that citation of authority should not be necessary. Cf., *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886). As stated in *Hurtado* v. *California*, 110 U.S. 516, 531-32 (1884):

> "In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations *upon all the powers of government*, legislative as well as executive and judicial." (My emphasis.)

The majority finally urges that *Schware* is distinguishable because "that case dealt with the general right to practice a profession and did not deal with the narrower question of a right to specific employment." This same argument was urged in *Wieman* v. *Updegraff*, 344 U.S.

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does not advocate overthrow of the Government. *He contends* here, as he did in the California court, *that there is no evidence in the record which rationally supports a finding of doubt about his character or loyalty.* If this contention is correct, he has been denied the right to practice law although there was no basis for the finding that he failed to meet the qualifications which the State demands of a person seeking to become a lawyer. *If this is true, California's refusal to admit him is a denial of due process and of equal protection of the laws because both arbitrary and discriminatory.*" (My emphasis.)

183, 191-92 (1952), and there answered by the Supreme Court:

> "We are referred to our statement in *Adler* that persons seeking employment in the New York public schools have 'no right to work for the State in the school system on their own terms. * * * They may work for the school system upon the reasonable terms laid down by the proper authorities of New York.' 342 U.S., at 492. To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. . . . We need not pause to consider whether an abstract right to public employment exists. *It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory.*" (My emphasis.)

I think it clear that although an individual teacher has no constitutional right to be hired for a particular position, nevertheless, a school board's selection process in a renewal of a teacher's contract cannot be upon an arbitrary or capricious basis. The pursuit of a chosen employment has been recognized as a right which is "of the essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax* v. *Raich*, 239 U.S. 33, 41 (1915). Cf., *United States* v. *Lovett*, 328 U.S. 303, 314 (1946). The "right to teach" is a recognized "liberty." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). *Epperson* v. *Arkansas*, 37 U.S.L.W. 4017 (U.S. Nov. 12, 1968). Cf., *Bomar* v. *Keyes*, 162 F.2d 136 (2 Cir. 1947) (an "interest" may be "an expectancy of continued employment"). See also Note, 81 Harv. L. Rev. 1045, 1080 (1968). This principle has been made viable in many cases relating to government employees, including teachers, lawyers and other vocations wherein an arm of government arbitrarily seeks to deprive a citizen from his rightful pursuit of employ-

ment. In *Allgeyer* v. *Louisiana*, 165 U.S. 578, 589-90 (1897), the Court said:

> "It was said by Mr. Justice Bradley in *Butchers' Union Company* v. *Crescent City Company*, 111 U.S. 746, 762, in the course of his concurring opinion in that case, that 'The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen.' Again, on page 764, the learned justice said: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' And again, on page 765: 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the Fourteenth Amendment."

In *Birnbaum* v. *Trussel*, 371 F.2d 672 (2 Cir. 1966), the Second Circuit reviewed a suit brought under the Civil Rights Act by a physician who was dismissed from a municipal hospital in Brooklyn, New York, without notice of charges. Other city hospitals were notified not to put Dr. Birnbaum on their staffs. He was later told his discharge was because of his "anti-Negro" bias which had

been complained of by union employees working at the hospital. The district court denied plaintiff's complaint for failure to state a ground for relief. The court of appeals sustained the lower court's ruling that plaintiff did not allege facts sufficient to establish a deprivation of equal protection of laws under 42 U.S.C. § 1985(3), but held a claim was stated for a conspiracy to violate 42 U.S.C. § 1983. The court, after reviewing the existing cases, noted:

> "The principle to be extracted from these cases is that, *whenever there is a substantial interest*, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist." (My emphasis.) 371 F.2d at 678.

The court then stated that it considers "the ability to pursue a profession effectively" to be a substantial interest and noted that this interest has received "meticulous protection . . . to prevent direct injury by arbitrary state action." 371 F.2d at 678-79 n. 13. Immediate temptation exists to distinguish the denial of the license to practice law or the discharge of the city doctor from the status of the "non-tenure" teacher whose contract is not renewed. However, analysis makes such distinction superficial. *In each situation, the right to the specified job is not in issue; rather, the focal stake is the personal liberty to pursue one's employment without arbitrary vilification and reckless exclusion by the state.*

The result here also overlooks the full implications of *Greene* v. *McElroy*,[7] 360 U.S. 474, 492 (1959) and *Cafe-*

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[7] Although the Court in *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961), limits *Greene* v. *McElroy*, 360 U.S. 474 (1959), to a nonconstitutional basis, the Court has acknowledged that *Greene* had constitutional implications. See *United States* v. *Robel*, 389 U.S. 258, 263 (1967).

teria & Restaurant Workers Union v. *McElroy*, 367 U.S. 886 (1961). In *Cafeteria Workers*, relief was denied a cook who lost her job for failure to meet security regulations of a Naval Gun Factory. The majority opinion emphasizes that the exclusion did not in any way impair the employee's employment opportunities elsewhere[8] because the plaintiff there had been offered other employment that did not require compliance with security regulations.

The instant facts fall within the statement of the Supreme Court in *Cafeteria Workers*, 367 U.S. at 897-98:

> "[T]he state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer. But to acknowledge that there exist constitutional restraints upon state and federal governments in dealing with their employees is not to say that all such employees have a constitutional right to notice and a hearing before they can be removed. We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract with M & M.
>
> "*Finally, it is to be noted that this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity.*" (My emphasis.)

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8 Justice Brennan dissents, joined by Chief Justice Warren, Justices Black and Douglas. Mr. Justice Brennan there said:

> "Such a result in effect nullifies the substantive right—not to be arbitrarily injured by Government—which the Court purports to recognize. . . ." 367 U.S. at 900.

Has a "badge of infamy" been bestowed upon these teachers by Dalton's reckless charges? To assume the negative is to obscure realistic appraisal of the plaintiffs' opportunities for future employment in their profession. The present charges of incompetency will have serious and detrimental effects on their entire teaching careers. Their respective liberty to pursue their professions within their community and state has been seriously impaired if not totally abrogated.

A teacher's ability to earn a living by pursuing his profession is fundamentally different from other professions such as law or medicine. The teacher's opportunities are narrowly confined. As has been observed, "admission to the profession comes through licensing, but admission to practice is dependent upon some public employer of teachers, a school district, admitting the licensed teacher to practice." Campbell, Cunningham & McPhee, The Organization and Control of American Schools, 259 (1965). The old adage that "bad news travels fast" is devastatingly accurate in weighing a teacher's opportunities for employment when released upon charges of incompetency. The selection of competent teachers is still competitive in Arkansas. Cf. *Walton* v. *Nashville, Ark., Special School Dist.*, 401 F.2d 137 (8 Cir. 1968).

In comparing selection of teachers with the process of release, it has been said:

> "Moreover, appointment is done privately, it has no public repercussions for the rejected candidates. It carries no implication concerning the unfitness of the latter, *whereas dismissal has very serious consequences for the reputation and the future of the person who is subjected to it.*" (My emphasis.)

MacIver, Academic Freedom in Our Time 171 (1955).

It is difficult to imagine how plaintiffs' abilities to pursue the teaching profession could have been more thoroughly circumscribed than they were here. Indeed, as in *Birnbaum* v. *Trussel, supra*, the issue here is the right to pursue a profession effectively. See also, *Schware* v. *Board of Bar Examiners, supra; Konigsberg* v. *State Bar, supra; Slochower* v. *Board of Higher Educ., supra; Wieman* v. *Updegraff, supra; Douglas* v. *Noble*, 261 U.S. 165 (1923); *Crane* v. *Johnson*, 242 U.S. 339 (1917); *Dent* v. *West Virginia*, 129 U.S. 114 (1889); *Parker* v. *Lester*, 227 F.2d 708 (9 Cir. 1955); *Johnson* v. *Branch*, 364 F.2d 177 (4 Cir. 1966).

Recognition of plaintiffs' claims does not mean that a school board cannot exercise its discretion to reject a teacher for incompetence. To grant plaintiffs relief does not in any way raise non-tenure positions to tenure status. Nor does it mean that federal courts or the Civil Rights Act will become a haven for every disenchanted school teacher whose teaching contract is not renewed. As stated by the Supreme Court:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,' *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960). . . ."

Epperson v. *Arkansas*, 37 U.S.L.W. at 4019.

When the board's discretion is challenged, the burden of proof always remains on the plaintiff to demonstrate

impermissible grounds. This burden was satisfied here. A proper holding here would relate only to that area of judicial review which traditionally protects individuals from arbitrary and capricious actions of a state. When governmental arbitrary action occurs under color of state law, and an individual has been deprived of federal rights as a result thereof he should appropriately be able to seek redress in the federal courts under the civil rights statutes. It seems to me this is what this case is all about. As long as a public school board chooses to set forth reasons for a teacher's exclusion and the stated grounds are damaging to professional qualification, I submit the Constitution affords the protection of substantive due process.[9]

I would reverse and remand with directions for the trial court to find for each of the plaintiffs and to receive evidence as to appropriate damages to be awarded. Cf. *Smith v. Board of Educ. of Morrilton School Dist.*, 365 F.2d 770 (8 Cir. 1966).

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[9] I find it unnecessary to discuss procedural due process. The essence of plaintiffs' claim here is that their exclusion was arbitrarily made without basis in fact. Even had plaintiffs been given several hearings, if there exists no evidentiary support to the charges of incompetency, a claim for relief is properly stated under 42 U.S.C. § 1983. Mr. Justice Harlan said in *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (dissenting opinion):

> "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. . . ."

Judgment

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1968

No. 19016

JESSE FREEMAN, ESSIE M. CALLOWAY, INEZ NICHOLS, LOIS WALKER, THERESA N. WHITE, EARLENE WOODS, and THE ARKANSAS TEACHERS ASSOCIATION, INC.,

Appellants,

vs.

THE GOULD SPECIAL SCHOOL DISTRICT OF LINCOLN COUNTY, ARKANSAS, a Public body corporate; T. RAYMOND SAGE, Superintendent of Schools of the Gould Special School District of Lincoln County, Arkansas; and HORACE ITTY DALTON, Principal of Field High School, Gould, Arkansas.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, in accordance with majority opinion of this Court this day filed herein.

January 15th, 1969.

Decision of District Court

* * * * *

The Court: This case, filed by the plaintiffs, will rely on the jurisdiction of the Court invoked by the provisions of Title 28-USC-1343, Paragraphs 3 and 4 which provides, and I quote the pertinent paragraphs: (3) "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Paragraph 4: "To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights including the right to vote."

The complaint further relies on this matter as an action in equity authorized by law, Title 42, USC-1981 and 1983. Title 42, Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions, of every kind, and to no other."

Title 42, Section 1983 provides that: "Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceeding for redress."

These are the provisions of the Code generally referred to as the civil rights. The latter provision that I have just read is an old provision to the Code that goes back to 1881. The complaint is drawn as a civil right action. Paragraph 3 of the complaint alleges that the "Individual plaintiffs are Negro citizens from the State of Arkansas and the United States who were employed by defendants to teach in the all-Negro Field High School for 1966-67 school year."

Paragraph 2 of the complaint — injunctive relief — is "sought to prevent the defendants from continuing their policy, practice, custom, and usage of employing, assigning, and utilizing teachers on the basis of their race or color."

These two paragraphs of the complaint are pertinent to paragraph 8, paragraph 11 and paragraph 14, all having to do with the issue, the question of civil rights.

The Court has attempted to be not only patient but extremely liberal in permitting testimony to be given in this case which, as the Court observed then and is more convinced now, has nothing to do with the question of civil rights. There is no semblance of testimony or any indication shown by any of the witnesses to the contrary. The plaintiffs' witnesses, the plaintiffs involved themselves, testified without exception that they knew of nothing to substantiate the allegations that their termination was due to civil rights issue or question, or because of their race or color.

Now, the Court would just like to say that this is a frivolous matter that should have never been brought to this Court. Federal Courts are not set up for the purpose of settling a fuss between certain people in a given area, and in a jurisdiction where your educational problems are

involved, and the operation of your school is involved. The Constitution and the Statutes providing the rights, equality, the privileges and the immunities is very clear. It's there for a particular purpose, and this Court is going to enforce those rights, insofar as the responsibility is concerned, as he sees it.

I do not believe that such a frivolous and trivial matter as this, of a little fuss going on between certain people in an area down there, should be brought into the Federal Courts alleging that is a Federal question. You have come to the wrong court; you are here on a wrong charge and under a wrong assumption. The State laws are provided to settle a matter of this kind. The Statutes, itself, of the State of Arkansas provide the method of employment of teachers by school boards. The responsibility of the school boards is to operate within the law, and that is constitutional law; that has been very clearly set out by our own Eighth Circuit in not one case but in innumerable decisions that have been handed down. But it does not give the right to bring any little argument that might develop between parties, where this issue is involved at all, into the Court on the basis that it becomes a Federal question. And this Court is not going to hear any other matters of this kind.

I do not think that under the testimony brought, the contention here, that there is any merit whatsoever. The Court is, therefore, going to dismiss this complaint. The exceptions can be saved. You may prepare a precedent, Mr. Light, to carry out this decision.

* * *

Decree of District Court

This cause came on to be heard on July 13, 1967, plaintiffs appearing by their attorneys, John W. Walker and George Howard, Jr., and defendants appearing by their attorneys, G. Ross Smith and Robert V. Light, and after hearing all the evidence adduced on behalf of the plaintiffs, the plaintiffs having rested, and the defendants having moved for judgment of dismissal of the Complaint, the Court finds:

FINDINGS OF FACT

1.

That the employment of the individual plaintiffs was terminated by defendants for reasons wholly unrelated to any improper racial considerations.

2.

That the defendant School Board acted within the discretion vested in it by law in electing not to re-employ the individual plaintiffs for the 1967-68 school year.

CONCLUSION OF LAW

That the proof fails to establish that defendants have deprived plaintiffs of any rights, privileges, or immunities secured by the Constitution and laws of the United States.

IT IS THEREFORE ADJUDGED AND DECREED that the Complaint be dismissed at the cost of plaintiffs.

/s/ OREN HARRIS
United States District Judge

Detailed Summary of Testimony Concerning Termination of Petitioners' Services

On or about June 1, 1967, petitioners received letters from Superintendent Sage stating that their teaching contracts would not be renewed for the 1967-68 school year (R. 6, 9).[1] At that time, petitioners had been teaching in the district for periods ranging from four months to thirty-six years (R. 3-4, 9). The superintendent stated that the sole responsibility for discharging petitioners lay with principal Dalton[2] (R. 197-98); that even though Dalton had

[1] The decision to terminate petitioners' contracts was made by the Board upon the recommendation of the Superintendent, who in turn based his recommendation upon that of principal Dalton (R. 246). When the Board made its decision to terminate the contracts, it had no information before it other than a letter from principal Dalton (R. 222, 224) dated May 1, 1967 (R. 248). The Board normally followed the recommendations of Superintendent Sage and Dalton (R. 217). Prior to its decision the Board held no meetings at which teachers in the Gould system could appear and discuss with the Board such matters as their individual competence or friction with the school administration (R. 218), and according to Sage, the Board made no investigation of Dalton's recommendations (R. 191). Although the president of the Board stated he conducted a personal investigation (R. 225), he later clarified his testimony, indicating that the investigation consisted of the unsolicited comments to him by several school district patrons *after petitioners' contracts were terminated* to the effect that the Board had made a "good" change at the Field school (R. 242-43).

[2] Principal Horace Itty Dalton is a 1927 graduate of Philander Smith College (R. 257) whose only experience in an administrative position was as principal of the Paris, Arkansas Negro school in 1960 (R. 30). His major experience was 19 years' service as an athletic coach, physical education and history teacher at Menifee, Arkansas (R. 20). He was also employed as a maintenance man, student counsellor (R. 22) and stainless steelware salesman (R. 25) prior to coming to the Gould Special School District as principal of the all-Negro Field Elementary and High Schools in 1963 (R. 258). He was regarded by the respondents as fit only to be the principal of the Negro schools, but unqualified to serve as an administrator at the white schools (R. 183, 215, 244).

never submitted any letters or memoranda indicating that he was dissatisfied with petitioners' performance (R. 246), the superintendent had made no independent investigation of the charges against petitioners contained in Dalton's May 1, 1967 letter recommending their discharge (R. 191, 248).

Although his May 1 recommendation to Superintendent Sage that petitioners not be retained as Field teachers was apparently based, at least in part, upon the specific complaints listed in his letter, Dalton had never suggested deficiencies or areas for improvement to the petitioners in writing (R. 259-60, 274), nor had his wife, who acted as his assistant (R. 274). Dalton never conferred with Mrs. Woods about her "shortcomings" (R. 279), never discussed with Mrs. Freeman the reasons for which she was eventually terminated (R. 260), never conferred with Mrs. Nichols about her failings (R. 82), never spoke to Mrs. Calloway about her alleged failure to teach cooking and sewing (R. 98), nor gave any of these teachers any sort of preliminary notice of the grounds for their discharge (R. 111).

1. Dalton's standards.

Incompetence. Dalton testified that his standards for competence were the same as his wife's—although he did not know what his wife's standards were (R. 37). Dalton also testified that incompetence consisted of a teacher not exercising his or her qualifications by not working (R. 260). Other tests for competence consisted of not having "outmoded teaching trends," and presenting a work plan (R. 38). Dalton refused, however, to specify in what manner any of petitioners' teaching "trends" were outmoded (R. 71) and admitted all of petitioners were qualified (R. 278). He was unable to explain how he could characterize Mrs. Nichols as a "pretty good teacher" and "incompetent" in the same breath (R. 84).

Insubordination. When asked for the standards he used to determine whether teachers are cooperative, Dalton indicated the relevant questions to be whether they worked with the total school program when asked (R. 263). As further indicia, he added: staying in the classroom, off the road, and out of the bathroom, not conversing with the maintenance man[3] or knitting (R. 34-35). His standard for determining insubordination was: not following the chain of command (R. 265).[4]

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[3] Dalton's concept of the "chain of command" [see fn. 4 *infra*] seemed to mean only he should talk to the Field schools' maintenance man (R. 48).

[4] A charge levelled at nearly all petitioners was that they constantly ignored the "change [sic] of command" and took their problems to the superintendent or the board, rather than to the school principal.

The theory of the Gould School District hierarchy was that the principal of each school (Bill Little at the Gould schools; Dalton at the Field schools) was to exert the closest supervision over the faculty of the school. He was to be the representative of the school administration to the teachers; he was to be their first recourse in the event problems arose (see R. 256). By the same token, the principal was the chief source of information about each school and its faculty for the Superintendent. Thus, Superintendent Sage normally took Dalton's recommendations regarding the hiring or retention of personnel (R. 251). Superintendent Sage instructed the members of the faculties that they were to take their complaints to the principal first, but if they were not satisfied with his handling of matters, to go to Sage, and thence to the school board if they were still unsatisfied (R. 256). This was the "chain of command" frequently discussed (e.g., R. 265).

There is considerable testimony which demonstrates, however, that actual relationships within the Gould Special School District were structured in a manner quite different from that described above. Dalton testified that the Field teachers got their instructions from Sage at the beginning of the year (R. 40). Dalton's own knowledge of conditions in the schools over which he was principal was narrowed by his "delegation" of the elementary school to his wife's charge (see R. 36). The district operated programs at Field under P.L. 89-10, the Elementary and Secondary Education Act, but Dalton admitted he knew nothing about the Act, the responsibilities of the person hired under the program, or the instructions

2. Charges Against the Petitioners From Dalton's May 1, 1967 Letter to the Board[5] and From Exhibits at Trial.[6]

A. Mrs. Jesse Freeman (R. 235-36) (36 years at Gould)

Incompetent. Dalton said he had received information from his wife and Matt Locke that Mrs. Freeman was not working and was incompetent. He summed up his professional opinion of her: "old mules ain't what they used to be" (R. 267). He never personally checked on items his wife reported to him (R. 281). Dalton first stated that he never observed Mrs. Freeman teaching in her classroom (R. 42), then changed his mind, saying he had been in her classroom over five times (R. 50-51). Mrs. Freeman denied Dalton had ever visited her classroom (R. 304-05). Dalton said that Mrs. Freeman was not "progressive" (R. 58), but the district gave no standardized tests to measure pupils' progress (R. 58). Dalton said he measured progress with his "eyes" (R. 58). He admitted, though, that Field pupils *were learning* under their teachers in 1966-67 (R. 71) and that Field students did "make it" in colleges

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given her by Mr. Sage (R. 277) whom Dalton recognized to have supervisory authority over 89-10 personnel (R. 90). In fact, Dalton viewed an 89-10 employee as "just another teacher" (R. 89).

Teachers at Field were rebuffed in their efforts to follow the chain of command. In uncontradicted testimony, Mrs. Wilhite said Dalton advised them never to go to the Superintendent or the Board, since they would not be believed anyway (R. 295). When Dalton himself was requested by Mrs. Walker, the 89-10 teacher and a petitioner here, to transmit her program to Superintendent Sage, he tore it up and never gave it to him (R. 275).

[5] The May 1 letter is quoted in pertinent part *supra,* p. 7 n.5.

[6] The charges contained in the exhibits were produced for the first time at trial (R. 234-35). The citations to the record following each petitioner's name indicate the place where the exhibits' charges were read into the record.

(R. 69-70). He refused to state *how* any of petitioners' teaching methods were outmoded (R. 71). Nor could he state what he would require of petitioners to convince him they were worthwhile teachers (R. 86-87). Mrs. Freeman testified that Dalton never expressed to her, prior to her termination, that she was incompetent (R. 304).

Insubordinate. Dalton testified that Mrs. Freeman was cooperative with the total program of the school, but that "she didn't do the things that she was supposed to do" (R. 271). He had no information concerning her failure to follow the chain of command by circumventing him and going directly to the superintendent (R. 43).

Frequently leaves school premises and the classroom without authorization. Mrs. Freeman flatly denied this charge, stating that she never left the campus without asking permission (R. 306). Although Dalton alleged that she was in her car on the roads during school hours (R. 267-68), he could not give any dates or name any witnesses (R. 269). He had nothing in his school record to reflect her absences (R. 47). He claimed he himself was away from the school some of those times (R. 269). He never spoke to her concerning her alleged absences (R. 268). Nor did he write the superintendent about this although he characterized it as a "serious problem" (R. 47).

Children are reportedly afraid of Mrs. Freeman. Dalton had no personal knowledge of this (R. 270). Mrs. Freeman denied her students were afraid of her (R. 306).

Practices church music on school piano during lunch and recess leaving children unattended. When asked what all his reasons for terminating Mrs. Freeman were, both at the trial and at his deposition, Dalton did not mention this charge at all. Mrs. Freeman testified that although she

did use the piano once or twice, she stopped the practice after Mrs. Dalton asked her to do so (R. 117, 306-07).

Uses school duplicating equipment for church materials. Dalton testified that Mrs. Freeman used mimeograph equipment for church functions (R. 270). According to Mrs. Freeman, such use of the school's mimeograph machine was a common practice at Field (R. 307). She testified she ceased the practice when Dalton requested it (R. 118, 307-08). Furthermore, she stated she had always asked permission of school authorities to use the machine (R. 118).

Tardiness. Dalton said that he didn't see Mrs. Freeman tardy "too much" (R. 271). He produced no school records reflecting Mrs. Freeman's alleged lateness. She denied being late (R. 308).

Other charges mentioned by Dalton which were not among those contained in his letter (the only information before the board when it decided to terminate Mrs. Freeman's contract) deserve brief mention. He charged that Mrs. Freeman was "nosy" (R. 43), adding that nosiness didn't affect the school program (R. 44). Dalton also charged she spent too must time conversing with the maintenance man (R. 48) but he never spoke to her about this or any other problem (R. 260).

The record demonstrates that Mrs. Freeman was called upon to testify against Dalton on a criminal charge (R. 53-55, 273). Mrs. Freeman's testimony that principal Dalton accused her of assisting the Student Non-Violent Coordinating Committee (SNCC) in Gould (R. 314) is unrebutted. Finally, Dalton also noted in discussing Mrs. Freeman that she "wasn't too friendly"—that she stopped coming in to chat with Mrs. Dalton (R. 49).

B. Mrs. Lois Walker (R. 236-37) (4 mos. at Gould)

Insubordinate and non-cooperative. Dalton testified that Mrs. Walker, the 89-10 teacher, did not cooperate with any of the elementary department teachers, that she refused to help other teachers with their normal duties, wishing to limit herself to teaching remedial reading (R. 275-76), and that she refused to accept bus duty (R. 89). Further, she allegedly bypassed him and "ignored the chain of command" (R. 274). On the other hand, Dalton's knowledge of conditions at the elementary school was limited—he stated his wife knew more about the department than he (*e.g.*, R. 86); he was unaware of Mrs. Walker's duties as a P.L. 89-10 (20 U.S.C. §821 et seq.) employee or the directions given her by Superintendent Sage (R. 277), who had supervisory authority over 89-10 personnel (R. 90). Mrs. Walker said the superintendent had excused her from bus duty (R. 336), and that any difficulties she had with teachers resulted from her attempts to follow Sage's instructions to limit classes to 10 students (R. 333-34). No Field teacher was called by the school district to substantiate alleged difficulties in working with Mrs. Walker (*cf.* R. 343-44).

Mrs. Walker's testimony that the superintendent excused her from bus duty because 89-10 teachers did not share the same responsibilities as regular teachers (R. 336) was not denied by Sage or Dalton. The Superintendent was unable to recall his instructions to Mrs. Walker, whether he told her to discuss problems with him or Dalton (R. 252-53)—but admitted that when absent she reported this fact by telephone to his office (R. 253). Mrs. Walker's program was approved by Mr. Little, the Gould schools principal, in lieu of Mr. Sage (R. 334).

Absent from duties after pay-days. Dalton charged that Mrs. Walker was absent from the job for one or two days after every payday. However, he conceded that he had no records to show this allegedly long and serious string of absences (R. 277). Mrs. Walker denied any unauthorized absences (R. 336).

Refused to take second-grade children in her class after having agreed to tutor them. As for this charge, Dalton failed to substantiate it in his testimony, and Sage testified that Mrs. Walker's primary responsibility was for grades 3, 4, 5 and 6 (R. 254). Mrs. Walker testified that she received her instructions from Sage (R. 333).

Dalton also stated at the hearing, although it was not a charge against Mrs. Walker presented to the Board in his letter of May 1, 1967, that she was incompetent because, although qualified, she did not do her work (R. 274-75).

C. Mrs. Earlene Woods (R. 239) (2 yrs. at Gould)

Incompetent. Dalton testified that Mrs. Woods was incompetent because she did not put her qualifications to work (R. 278), but he never informed her or Superintendent Sage in writing that he was dissatisfied with her performance (R. 279). He never conferred with her about her shortcomings (R. 279). He did not know any specific way in which her teaching methods were outmoded (R. 66). Mrs. Woods stated that the principal never observed her teaching performance in her classroom; that Mrs. Dalton was in her room but two or three times to give announcements; and that the school administrative staff never told her she was incompetent (R. 325). No standardized tests were administered to Field pupils to measure their achievement (R. 58).

Frequently left children unattended in classrooms. Dalton said that Mrs. Woods (like Mrs. Freeman) was always talking to the maintenance man for ten to fifteen minutes after the bell (R. 62, 283) and accused her of being out of her classroom "most of the time" (R. 60), but he never mentioned this lapse to her (R. 283). He said he had seen Mrs. Woods out of her classroom more than twenty times—*e.g.*, coming from the toilet (R. 60-61). Mrs. Woods was in the bathroom all the time according to Dalton (R. 65). Mrs. Woods flatly denied the charge (R. 325-26).

Failure to attend school functions as required. Dalton testified that after he asked his wife to speak to Mrs. Woods about attending night activities, she did so satisfactorily (R. 64). Mrs. Woods stated that she attended all the basketball games and night school functions she was supposed to attend (R. 326).

Did not give homework assignments. The evidence on this charge consisted of Dalton's accusation (R. 61-62), his admission that he never discussed this with her (R. 62), and Mrs. Woods' denial of the charge (R. 326). No records to substantiate the charge were introduced.

Knitted during school hours. The evidence in the record consists of Dalton's charge (R. 61) and Mrs. Woods' outright denial (R. 326).

Demonstrated inability to get along with other faculty members. Dalton said nothing about this charge in his deposition or at the trial. He imagined his wife got along with Mrs. Woods (R. 65). Mrs. Woods stated her only difficulty was with Mrs. Anderson, who insisted on leaving Mrs. Woods' car after an argument, and who later told Mrs. Woods she would be fired (See R. 327-29).

D. Mrs. Essie Calloway (R. 239-40) (4 years at Gould)

Mrs. Calloway was unable to appear at the trial, but it was stipulated that she would have denied all of the charges contained in Principal Dalton's letter (R. 338-39), that she would have testified Dalton's improper advance toward her was, "If I were a few years younger, what I could do with you," and that the F.H.A. program lapsed because Dalton failed to forward the dues for the school's chapter to the national organization (R. 338-341).

Incompetent and non-cooperative. Dalton stated that Mrs. Calloway's teaching methods were not outmoded (R. 94) and that she was incompetent in 1966 although competent in 1965 (R. 102). He alleged she was not teaching sewing or cooking (R. 96), and that she dropped a home economics class (R. 97) but these charges were not presented to the board prior to Mrs. Calloway's termination (R. 220). He never spoke to her about her failure to teaching sewing and cooking (R. 98-99). His conclusion was apparently based on the fact that on the occasions when he visited her classroom, her pupils were not cooking (R. 99).

Failed to attend basketball games. Dalton admitted most teachers did not participate in night activities at Field (R. 34).

Allowed F.H.A. Program to lapse. Dalton at first admitted that he permitted the program to lapse (R. 284) then inconsistently blamed it on Mrs. Calloway (R. 285).

Students transferring to Gould High School were notably deficient in basic home economics training. This was not a charge presented to the board prior to the termination of Mrs. Calloway's contract (R. 240). Dalton had no specific

testimony to back up this charge. The Superintendent said that after the termination of Mrs. Calloway's contract he spoke with the Gould High School's home economics teacher, who told him that the Negro transferees from Field were inadequately prepared (R. 248-49). He failed, however, to inquire about their final grades, the names of the students, or their innate abilities (R. 249).

Failed to conduct adult classes for which she was paid. Even if this charge is believed (see R. 96-97), there is no showing that this charge was related to Mrs. Calloway's discharge from her regular teaching position since the adult classes were separately funded (see R. 96).

E. Mrs. Inez Nichols (R. 315) (24 yrs. at Gould).

Uncooperative. Dalton said at the trial that he didn't know much about any of the charges against Mrs. Nichols (R. 285). His wife told him of her complaints about Mrs. Nichols (R. 72). He said Mrs. Nichols bypassed him just as Mrs. Woods did (R. 95). Mrs. Nichols testified that she did not know of a single instance when she was uncooperative, that neither Dalton nor anyone else ever told her that she was not being cooperative (R. 315-16, 319).

Habitually tardy to work and other functions. When asked his reasons for recommending the termination of Mrs. Nichols, both in his deposition and at the trial, Dalton made no mention of lateness. Mrs. Nichols stated that she always arrived on time (R. 316). Respondents introduced no school records to substantiate Mrs. Nichols' alleged tardiness.

Did not attend all the activities at which attendance was required. Dalton mentioned as one of his complaints about

Mrs. Nichols (R. 81) that she failed to attend any night activities at Field, but stated that he never wrote her or called her in for a conference about the fact that she was not participating (R. 82). Nor did he produce any school records to show Mrs. Nichols' absences.

Frequently left town during school hours. Dalton's only reference to this charge came in his testimony that she was off campus five days when her mother was sick (R. 73). Mrs. Nichols stated that she was out four and a half days due to the illness, which did not otherwise affect her daily attendance (R. 316). She was off-campus one day with Mrs. Dalton's permission (R. 134).

Wanted to choose the students she wanted to teach rather than those assigned, refused to agree to alphabetical division of the third-grade students. In all of Horace Itty Dalton's testimony, there is not a word concerning this allegation. Mrs. Nichols said she taught all children assigned her (R. 317).

Refused to give up room when classroom arrangements were revised. Dalton said nothing of this charge either. Mrs. Nichols said she had never been requested to give up her room (R. 317).

Overly-possessive attitude toward school's equipment. There is no specific testimony about this vague charge. It apparently related to some Project Headstart toys which Mrs. Nichols said the superintendent permitted her to keep in her room (R. 317).

Sat in back of room to teach, found to be asleep in class on occasion. Dalton did not mention this charge in his testimony. Mrs. Nichols explained that at times her class was

divided into learning groups and only on those occasions might she be in the rear of the classroom working with a small group (R. 318-19). She denied sleeping in class (R. 317).

Used Headstart toys for third and fourth grade, these being intended for pre-school age groups. The only testimony related to this charge was that of Mrs. Nichols, who stated that the superintendent permitted her to keep the toys in her room and that she was never advised of a specific use for the toys (R. 317, 319).

A matter not presented to the board but one upon which Dalton relied at the trial to justify Mrs. Nichols' termination concerned her allegedly giving a child a "sackful" of milk (see R. 74-81). Dalton testified that he met a student in the cafeteria who had a bag containing half-pints of milk—more than a dozen, he thought, although he did not count them (R. 80). Because the young girl was from her class, he concluded the milk was from that requisitioned by Mrs. Nichols; the girl did not say, however, that Mrs. Nichols gave her the milk (R. 78). It did not occur to Dalton that the girl could have collected the milk from other students (R. 81). At the trial it was stipulated that the child had only four half pints of milk (R. 346). Mrs. Nichols stated that Mrs. Dalton had given the child permission to take the milk (R. 138).

F. Mrs. Theresa Wilhite (R. 240) (4 yrs. at Gould).

Non-cooperative, insubordinate. Dalton said of Mrs. Wilhite, "I don't know if she got along well with nobody. That's one thing that hurt her a whole lot" (R. 103). On the other hand, Mrs. Wilhite said the only requests of the principal which she ever refused were his indecent sexual proposi-

tions (R. 142-43, 291-93). Dalton at first admitted making the propositions (R. 102), saying, "Yeah. I'm kind of choicy. I'm busy. It won't be that kind." Later he denied making them (R. 106).

Failed to attend school functions as required. No school records supporting this charge were introduced; Mrs. Wilhite said she attended about 50% of the functions (R. 293). However, Dalton stated that most Field teachers did not participate in these activities (R. 34).

Meted out her own punishment without referring problems to disciplinary committee. Mrs. Wilhite denied punishing her students any more than any other teacher, and the only instance she could recall to which the charge might have referred was her detaining one student after class (R. 294).

Refused to do bus duty. Mrs. Wilhite testified that she remained at school for bus duty as long as she could and still get a ride home in the afternoons, and that other faculty members who missed bus duty were not discharged (R. 294-95).